

be executed was expressed to be from 1 July 2008 to 30 September 2008. In October 2008 the Trust presented Ms Thompson with a further draft agreement expressed to expire on 30 June 2009. Ms Thompson did not sign it but meanwhile carried on with her duties as usual.

[3] On 17 February 2009 Ms Thompson wrote to the Trust with her response, clause by clause, to the draft. This included a concern about the agreement being expressed to be for a fixed term.

[4] The Trust responded by arranging a meeting on 15 May. Ms Thompson attended supported by her sister and by Dave Hereora an organiser from the Service and Food Workers Union (SFWU.) By this time uncertainty had arisen about whether funding would be available for the position beyond 30 June and part of the discussion at the meeting centred on possible ways to keep the position going.

[5] On 29 May there was a further meeting at which Ms Thompson was again accompanied by her sister and by Mr Hereora. There is no dispute that during this meeting Ms Thompson was told that she would not be offered a further fixed term agreement after 30 June and that she was thereby given notice that her employment would end on that day. Ms Thompson told the Authority:

“I am certain that at that meeting the Trust was aware that I was challenging the fixed term nature of the agreement and the fact that it was expiring on 30 June.”

[6] Ms Thompson took sick leave from 15 June. Her employment ended on 30 June. On 7 July she wrote to the Trust raising concerns about what had happened.

[7] It is argued on Ms Thompson’s behalf that she raised a personal grievance of unjustified dismissal through a combination of the following:

- i. the letter of 17 February and/or
- ii. statements she made in the meeting of 29 May and/or
- iii. the letter of 7 July.

[8] The respondent disagrees. It says it first realised there was an employment relationship problem on 1 October when it was contacted by the Department of Labour mediation service and told that Ms Thompson had requested mediation. It now says that it had insufficient information about the problem for it to be said that a grievance had been raised at that point. As to when a grievance was finally raised, the respondent has variously suggested 23 October (when Mr Hereora wrote explaining the nature of the employment relationship problem) 1 December (when it received correspondence from Mr Oldfield) and 8 February (when it was lodged in the Authority.)

[9] In the alternative (should it be found that the grievance was not raised on or before 7 July 2009) it is argued for Ms Thompson that there are exceptional circumstances such that leave should be granted for the grievance to be raised out of time. The exceptional circumstances relied on are those set out in section 115 (b) of the Employment Relations Act as follows:

“where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time”

[10] Ms Thompson says that she first asked Mr Hereora to pursue her grievance soon after the end of her employment but is not sure exactly when that was. She says that this instruction was formalised by approximately mid July when she completed the union’s standard *“request for assistance”* form and passed it to Mr Hereora.

[11] Mr Oldfield argues that by asking the union to assist her in pursuing the grievance Ms Thompson made reasonable arrangements with the union for it to raise the grievance on her behalf.

[12] The issues for determination are:

- i. whether a grievance of unjustified dismissal was raised through the letters of 17 February and 7 July and statements made at the meeting of 29 May, and if not,

- ii. whether Ms Thompson made reasonable arrangements to have the union raise the grievance on her behalf and whether the union unreasonably failed to ensure that this happened within the required timeframe.

(i) **Was the grievance raised in time?**

[13] Ms Thompson's letter of 17 February included the following comment on the Term of the Agreement:

"My first concern is that this is a fixed term agreement justified by uncertainty around Ministry of the Environment funding. As I have been employed consistently for nearly 4 years there is obviously an ongoing need for the service and the work I do and therefore a fixed term agreement is not justified."

Every position is dependent on some form of funding whether it be by sales in the case of retail, Govt funding in the case of publicly funded services. All jobs depend on the employer being able to pay for the position through whatever income source the employer has, so it is irrelevant that the secure funding is only till June 2009."

[14] Ms Thompson told the Authority that at the meeting of 29 May she again challenged the fixed term nature of the agreement and the fact that it was expiring on 30 June. The respondent does not essentially dispute this, but says that this does not amount to the raising of a dismissal grievance.

[15] On 29 May the respondent's representative, Kerry Single sent Mr Hereora "*notes regarding the meeting held on Friday 29 May 2009.*" These notes recorded that there had been discussion of Ms Thompson's concerns about the proposed individual agreement. Among the concerns identified were:

"issues ...about the Fixed Term of the Agreement and how she believed that as it had been an ongoing service and she had been employed consistently for the fixed term periods was not justified [sic.]"

This is disputed by the Trust Board in that her position was contestable each year and the funding for the position was solely dependent on the availability from Government sources which was only allocated each year.

It was explained that there was and can be no certainty that it will always be there and as such it was in order to have the fixed term of the agreement as explained in the IEA and agreed to each time by the Employee in that position.”

[16] The letter recorded some discussion around other provisions in the draft agreement and then (in the latter part of the notes) went on:

“It was clearly explained that the present position will end as at the 30th June 2009 as there is no certainty that funding will be available after that date. Melissa was given formal notice of this at the meeting.

It was also explained that if... the Trust were successful in obtaining further funding and it was still the intent of the Trust Board to have the position continue subject to that funding then Melissa would be invited to apply and be considered in line with any other applicant. There were no guarantees or promises that she would or could be assured or the position.”

[17] The letter then went on to record further discussions about funding and referred briefly to some without prejudice discussion which had come to no conclusion. It ended with a statement that the notes were not to be taken as a verbatim record and an invitation to contact the writer with any questions.

[18] The respondent asserts that these notes refer to nothing that could be construed as the raising of a grievance. It also asserts that if they had omitted something as important as the raising of a grievance, Mr Hereora could have been expected to have followed up on the invitation at the end of Mr Single’s letter and queried the omission. Since he did not the respondent asserts that the letter should be taken as a reliable record of the meeting, and evidence that a grievance was not raised at that meeting.

[19] On 15 June the Chairperson of the Trust, Christine Ralph, wrote to Ms Thompson acknowledging receipt of a medical certificate and setting out some details of Ms Thompson's outstanding holiday entitlements. Brief references were made to the respondent proceeding with a restructuring which was underway at the same time that the outcome of the funding application was being awaited.

[20] Ms Thompson's letter of 7 July replies to this letter. In it Ms Thompson makes reference to her medical certificate, to funding issues¹, and to her holiday pay entitlements. It includes the following which it is argued forms part of the raising of the grievance:

“at the meeting on the 29th the approach that the board took through your employment advocate was non-negotiable. I feel that the board lacked consideration and support for me as an employee both at a personal and a professional level. In my opinion there is and was a clear lack of any good faith and open and honest communication. One week the theme was ‘how can we work through this situation together’ and the following week I am told to finish and go. What good faith there was, had (again) broken down and yet I was still expected to contribute to meetings for the continuing operation of the centre...”

Determination

The letter of 17 February

[21] As at 17 February Ms Thompson's expectation was that so long as funding continued (and she was involved in funding applications) a further fixed term agreement would eventuate in the same way as it had over the previous four years. In other words, she had no particular reason to think her job was at greater risk than at any earlier point in her employment. She certainly had not been dismissed. If any sort of grievance was raised then, it was not a dismissal grievance.

¹ Neither this letter nor that of Ms Ralph, which preceded it, gives any indication that the outcome of the funding application was known by that stage.

The meeting of 29 May

[22] In determining what took place on 29 May I have relied on Mr Single's notes, having accepted the assertion that since Mr Hereora did not challenge their accuracy they are the best available evidence of what transpired.

[23] As set out above (in what appears to be the later part of the meeting) the respondent told Ms Thompson that even if funding were to continue she would be required to apply in a contestable process for any ongoing position. The notes indicate clearly that there should be no assumption that funding would continue, or that if it did the position would continue² or, finally, that if the position continued and Ms Thompson applied, she would get it. In short, while there was a possibility that Ms Thompson might be re-employed, she was being dismissed from the job she had.

[24] At any time from this point in the meeting a personal grievance of unjustified dismissal could have been raised. That would indeed have been a very credible response to the news which had just been delivered. However, the notes do not record anything which can be construed in this way. The meeting turned back to the question of funding, and then on to without prejudice discussions. I am unable to conclude that a personal grievance was raised in this meeting.

The letter of 7 July

[25] In submissions Mr Oldfield noted that no particular formula of words needs to be used in order to raise a grievance and that not even the words "personal grievance" need be used. Regarding the letter of 7 July he argued:

"the applicant complained about a lack of good faith and open and honest communication ...this was clearly a complaint about her dismissal that the applicant wanted the respondent to address."

[26] I am unable to accept that the words of the letter of 7 July were as clear as submitted for the applicant. In her letter, Ms Thompson complains in very general

² At the same time as these events the respondent was undergoing an organisation wide restructuring process which affected not just Ms Thompson's role but others as well.

terms of a lack of consideration and support, poor communication and an absence of good faith. These comments are not, in my view, of sufficient clarity to raise a grievance of any sort, let alone dismissal.

[27] I am not satisfied that a grievance was raised on or before 7 July, by any one of the steps taken by Ms Thompson or by any combination of the three.

(ii) Did Ms Thompson make reasonable arrangements to have the union raise the grievance on her behalf?

[28] As set out above, on 29 May when Ms Thompson was given notice of dismissal the parties had yet to learn the outcome of the most recent funding application. If it were to be successful Ms Thompson anticipated that the respondent would expect her to re-apply for her job. Mr Hereora's recollection is that because of this, when he and Ms Thompson discussed her employment situation immediately after the 29 May meeting, they decided to hold off on pursuing the grievance until the outcome of the funding application was known.

[29] As things transpired, Ms Thompson did not learn the outcome of the funding application until after her employment ended. She cannot recall exactly when she heard that it had been declined but says it was on or soon after 7 July, informally, from one of the respondent's staff. After she had heard the news she asked Mr Hereora to go ahead with an application for mediation, and completed the union's formal "*request for assistance*" form. Neither she nor Mr Hereora can recall exactly when she handed this to him but say it was around mid July. Mr Hereora says that very soon after he got approval (through the union's own internal processes) to arrange mediation for Ms Thompson.

[30] Ms Thompson produced subject lines of email correspondence from her to Mr Hereora in the period from 23 June onwards. The content of those emails was not disclosed on the basis that they were privileged communications between Ms Thompson and her representative. The subject lines of potential relevance³ were as follows:

³ On 5 August, 22 August and 27 August, Ms Thompson sent emails whose subject lines contained references to pay issues.

- i. 23 June: “*letter of response*”
- ii. 26 June: “*Where are we at?*”
- iii. 28 June: “*re: Where are we at?*”
- iv. 10 July: “*Re Melissa, Tauranga*”
- v. 24 July: “*PG*”
- vi. 12 August: “*RE: PG*”
- vii. 21 September: “*Progress on mediation/PG*”
- viii. 2 October : “*Re: Progress on mediation/PG*”

[31] As things turned out, Mr Hereora did not proceed promptly to arrange mediation as Ms Thompson expected. It took until 1 October for him to do so. He told me that there was no reason for this delay other than his own busy schedule.

Determination

[32] The references to “PG” on 24 July and thereafter are consistent with Ms Thompson’s recollection that by this time she had asked Mr Hereora to pursue her grievance and had completed a formal request for assistance. I accept the evidence that by approximately mid July Ms Thompson had advised Mr Hereora that she wished the union to pursue her grievance.

[33] I also record that to pursue a grievance must necessarily include raising it, since a grievance cannot be pursued without first being raised. I am satisfied that this amounted to making reasonable arrangements to have the union raise the grievance on her behalf.

[34] Since there can be no real dispute that the union unreasonably failed to ensure that the grievance was raised, it follows that Ms Thompson has made out exceptional circumstances as set out in section 115 (b).

[35] It remains only to consider whether it is just to grant leave. From 1 October the respondent was on notice of a personal grievance, even though it did not have all the details. 1 October was only marginally outside the 90 day period. The respondent has not been prejudiced by any significant delay. I heard nothing else to indicate that there would be any injustice in the grievance being raised.

[36] Leave is therefore granted for Ms Thompson to raise her grievance out of time.

[37] The substantive employment relationship problem is not before the Authority. However, section 114(5) of the Employment Relations Act provides that in any case where the Authority grants leave the Authority must direct to parties to use mediation to seek to mutually resolve the grievance. I therefore direct the parties to attend mediation within six weeks of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority